

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

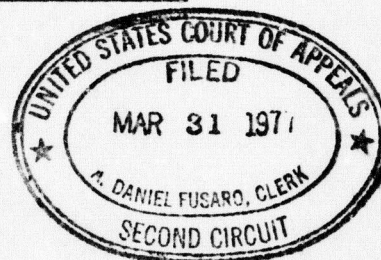
2-17-77

77-7004

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Docket No. 75-125



LAWRENCE BATEMAN

vs.

NORWICH UNIVERSITY, LORING E. HART,
Individually and as President of Norwich
University, JOHN B. WADSWORTH, JR., Individ-
ually and as Commandant of Cadets of Norwich
University

BPLS

BRIEF FOR PLAINTIFF-APPELLANT

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

DID THE LOWER COURT ERR IN GRANTING THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT?

II. STATEMENT OF THE CASE

PLAINTIFF-APPELLANT, LAWRENCE BATEMAN, CHALLENGES HIS DISMISSAL FROM THE DEFENDANT NORWICH UNIVERSITY IN MAY 1975.

The basis for this appeal revolves around the trial court's decision filed March 17, 1976 granting a Motion for Summary Judgment filed on behalf of the defendants. The basic issue presented to this Court for review is whether the defendant-appellees breached a contract of education entered into between Norwich University and Mr. Bateman.

Norwich University is a military university and its student body is organized into a Corp of Cadets. A body of regulations and a cadet handbook govern the actions of the cadets. All students at Norwich University are subject to an Honor Code which is administered by an Honor Committee composed of members of the Senior Class assisted by Honor Representatives from the Junior Class. The plaintiff, Mr. Bateman, was charged with a violation of the Honor Code, to wit stealing on April 10, 1975. The specifics of the offense of stealing were that, it was charged, Mr. Bateman siphoned gas from a fellow student's car.

The Honor Committee held a hearing on April 15, 1975 and, after said hearing, recommended dismissal of Mr. Bateman to defendant John B. Wadsworth, Commandant of Cadets of Norwich University. As the Affidavit of Loring E. Hart dated July 18, 1975 makes clear, on April 23, 1975, Mr. Bateman was dismissed from the Corp of Cadets. The District Court's Opinion and Order does not make clear the fact that President Loring Hart concurred in the

decision of defendant Wadworth to dismiss Bateman on April 22, 1975. The Order dismissing him from the Cadets was published the following day, April 23, 1975. It was not until April 24, 1975 that defendant Hart and plaintiff Bateman met to discuss the course of events which would proceed from the Order of Dismissal. It is important to observe this fact since the District Court's Opinion places great weight on Bateman's waiver of certain rights which were available to him.

On April 24, 1975 Mr. Bateman and defendant Hart met and agreed that Bateman would be allowed to complete his course work for the semester if he would reside off campus and use campus facilities only to attend classes, consult with Professors or use the library.

On Friday, May 9, 1975, the Commandant of Cadets, Mr. Wadsworth, reported to President Hart that Bateman had violated the agreement set out in that he had not signed in and out and had been seen in barracks. Wadsworth recommended Bateman's immediate dismissal and, without consulting Bateman, defendant Hart approved the dismissal and ordered Wadsworth to inform Bateman that he had been dismissed from the University. There was no hearing held on this subject and Bateman was not advised of the claims against him until May 12, 1975.

The plaintiff claimed in the Court below that Norwich University did not effect his dismissal in accordance with the University Regulations and therefore breached contractual duties owed to him thus nullifying the actions of the university officials in April and May 1975.

The Lower Court agreed with Mr. Bateman's position that the Regulations and the Cadet Handbook embodied the basic terms and conditions of the "contract of education" which existed between Mr. Bateman and the University. Additionally, the Court found that the University had violated various provisions of the contractual undertaking between itself and Mr. Bateman but for various procedural reasons, Bateman had waived his rights to claim these procedural defaults by his actions prior to his representation by counsel and prior to the filing

of this Complaint with the Court.

ARGUMENT

I.

THE LOWER COURT ERRED IN RULING THAT THE SENIOR HONOR COMMITTEE
HAD JURISDICTION TO TRY MR. BATEMAN FOR THE OFFENSE OF STEALING.

As indicated previously, plaintiff was tried before the Corp Honor Committee for the offense of stealing on or about April 15, 1975. Plaintiff takes the position that said Honor Corp Committee had no jurisdiction to try plaintiff for that offense under the Rules and Regulations established by defendant Norwich. Pursuant to the "REGULATIONS OF THE NORWICH UNIVERSITY CORP OF CADETS 1974-1975" certain classes of offenses against the orderliness of the University are established and a Commandant's Hearing Board is established to hear certain offenses. Page 61 of the "Regulations" provides in pertinent part that:--

"CLASS ONE OFFENSES - Cadets found guilty of committing Class One offenses will be awarded punishment by the Corp Review Board or a Commandant's Board depending upon the severity of the offense. Offenses which carry a maximum award of suspension or dismissal will be heard only by a Commandant's Board. Class One offenses are listed in Appendix One... .

COMMANDANT'S HEARING BOARD - The Commandant's Board will hear all Class One offenses which require members of the faculty, staff or civil authorities as witnesses or which could result in suspension or dismissal from the University."

Appendix I of the "Regulations" lists the offense misappropriation of property as a Class I offense. Bateman was accused of stealing which an Honor Code Offense but plaintiff contends and the Court below found that the offenses of misappropriation of property and stealing are virtually synonymous since no substantive distinction exists between the two phrases.

In response to the plaintiff's claim that the Corp's Honor Committee

lacked jurisdiction to try plaintiff for the offense of stealing, the lower Court, it is submitted, made three erroneous conclusions. First, the Court mistakenly characterized the jurisdiction of the Commandant's Board and Corp Honor Committee as having overlapping jurisdiction. Further, the Court indicated that Norwich should not be required to draft air tight hearing systems at its peril and that the University's interpretations of its own rules should be followed where that interpretation is reasonable. Third, the Court determined that when Mr. Bateman did not timely object to the Honor Committee Proceedings he waived his right to object to them.

With respect to the Court's claim that jurisdiction overlapped between the Honor Committee and the Commandant's Board, it is the Appellant's position that Page 61 of the Regulations very clearly divests the Honor Board of jurisdiction in cases where suspension or dismissal could result. Section 28 of the "Regulations" entitled Suspension and Dismissal provides that Cadets found guilty of stealing will be dismissed as provided in the Honor Code referring to the Cadet Handbook and Appendix II of the Regulations. However, Page 47 of the Cadet Handbook indicates simply that a cadet found guilty of stealing will be dismissed from Norwich University and the Corp of Cadets. Appellant's position is not that the Honor Board and the Commandant's Board had overlapping jurisdiction but rather by virtue of the explicit and clear language at Page 61 of the Regulations, the Honor Board had no jurisdiction whatsoever to try Mr. Bateman. It is a basic tenet of contract construction that a more specific provision will take precedence over a more general provision. No contract language could be more simply or explicitly stated than the provision in the Regulations which says that offenses which carry a maximum award of suspension or dismissal will be heard only by a Commandant's Board. Further, this construction does no violence whatsoever to the Honor Corp since the Honor Corp's goal of punishing stealing by dismissal is

satisfied by a hearing before the Commandant's Board. At Page 43 of the Cadet Handbook, it is stated that "a violation of the Honor Code is defined as any act of lying, cheating, attempting to evade the truth, conspiring to deceive or stealing. A Cadet who is found guilty of stealing or aiding a theft may be promptly dismissed from Norwich University." That goal is not jeopardized by having the student who steals or misappropriates property, dismissed after hearing by the Commandant's Board. In sum, Appellant contends that under the contractual scheme at Norwich University, as evidenced by the Regulations and Handbook, the lack of jurisdiction to try Mr. Bateman before the Honor Board is clear; the Commandant's Board was the specific body explicitly charged with hearing such offenses.

Appellant also submits that the lower Court erred when it concluded "The University's interpretation of its own rules should be followed when that interpretation is reasonable.... Norwich should not be required to draft air-tight hearing systems at its peril." It is settled in contract law that in choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom the writing otherwise proceeds. (See Restatement of Contracts I, Section 232.) In Vermont, the Courts have consistently adopted that principal. See Page vs. Hall, 125 VT 275 (1965); Stratton vs. Cartmell, 114 VT 191 (1945).

Appellant submits that the Court misinterpreted this settled contract principal. The Court basically determined that the construction opted for by Norwich was a reasonable construction and thus dismissed Appellant's claim. However, as indicated in Section 232 of the Restatement of Contracts and in the Vermont cases cited above, the question of reasonableness is a subsidiary question to the matter of construing a contract against its drafter. Appellant submits that the principal of construing ambiguities against the drafter is a

paramount principal to the concept of interpreting a contract to be reasonable. To the extent that there was an ambiguity in the contractual relationship between Appellant and Norwich by virtue of the fact that two groups seemingly had jurisdiction to try the offense charged that that defect should be able to be challenged by Appellant.

It is also significant to note that Michael Jennings, a Security Officer at Norwich University, was called to testify at the Corp Review Board Hearing (See Tr. of the Corp Review Board at Page 5). The "Regulations" Section 25-2(d) states that the Commandant's Hearing Board will hear all Class I offenses which require members of the faculty, staff, etc., as witnesses. The use of Mr. Jennings, a staff member at Norwich University as a witness against Appellant is another demonstration that the Corp Honor Committee had no jurisdiction under the Regulations to try appellant.

Finally, the Court concluded that even if jurisdiction were properly laid with the Commandant's Board rather than the Honor Committee, Mr. Bateman failed to timely object to the Honor Committee Proceedings and therefore waived his rights. The Court was not specific as to the manner in which a timely objection to these proceedings should have been made by Mr. Bateman. Appellant believes the following points to be pertinent to demonstrate the erroneous nature of the Court's ruling. First, Norwich University's Regulations and Handbook contain no provisions for "pre-trial" motions to challenge the jurisdiction of the Board trying the Cadet. Second, in analogous circumstances, Courts have ruled on numerous occasions that jurisdiction is never waived and that jurisdiction of a tribunal to try an individual can be raised even on appeal when that subject was not brought to the attention of the trier of fact. Third, the Affidavit of President Hart dated July 18, 1975, specifically indicates that Bateman was dismissed from the Corp of Cadets on April 23, 1975, the day before Mr. Bateman and President Hart entered into the agreement whereby

Bateman would be allowed to finish the remainder of the semester. As indicated in Section 25-2(g) (1) of the Regulations at Page 63, only the President of the University had the authority to approve a recommendation of dismissal from the Corp of Cadets. It is clear that prior to meeting with Bateman on April 24, 1975, President Hart had concurred and approved Bateman's dismissal by virtue of President Hart's actions on April 22, 1975 approving the recommendation of the Corp Honor Committee to dismiss Bateman. This Order was published on April 23, 1975 prior to President Hart's meeting with appellant. Significantly, the Court had no information upon which to determine what arguments were made by Bateman to President Hart on April 24, 1975. However, beyond that, the Order dismissing Bateman had already been issued and therefore appealing to President Hart pursuant to the provisions of Section 25-2(g) (1) would have been meaningless. It is of further significance to note that under Section 25-2 (g) (3) appeals are limited to only three arguments, none of which include the concept of challenging the jurisdiction of the tribunal.

For these reasons Appellant believes that the Court improperly decided the question of the jurisdiction of the Senior Honor Committee to try appellant.

ARGUMENT

II.

THE COURT ERRED IN CONCLUDING THAT APPELLANT WAIVED HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

Under the contractual provisions contained in the Cadet Handbook the following Rule is announced:--

"No person living under the Honor Code at Norwich University may compel any other person living under the Code to incriminate himself, or to answer any question which may tend to incriminate him. No person subject to the Honor Code may request a statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected; that if he does make a statement, it may be used against him; and that his silence will in no way be held against him. If an individual does wish to testify or make a statement at hearing, he then subjects himself to cross-examination." (See P. 46 of the Cadet Handbook).

The transcript of the hearing held on April 15, 1975 before the Corp Honor Committee indicates at Page 3 of the Transcript that before introducing any evidence against plaintiff, the Board asked several questions of the accused before bringing in the first witness. The record shows that the members of the Honor Board asked approximately 13 questions of the plaintiff going directly to the question of his culpability for the alleged misappropriation of gasoline. Nowhere in the transcript does there appear that the Honor Corp at any time complied with the self-incrimination prohibition contained at Page 46 of the Cadet Handbook. Instead, just the reverse appears. The District Court concluded that the Committee failed to give these required Warnings and that this failure constituted a breach of a fundamental right which Norwich had created and which was clearly applicable in the circumstances of this case. However, the Court took the view that any breach of duty by Norwich was cured when Bateman appealed from the Decision of the Honor Committee and failed to raise this objection at that time. In effect, the Court again concluded that Bateman, a sophomore at a college had waived a procedural, technical right available to him. It is submitted that the District Court failed to consider the following important facts relative to this claim of waiver:--

First, the Honor Committee of the Corp of Cadets recommended dismissal on April 16, 1975 to defendant Wadsworth, the Commandant of the Corp. On April 22, 1975, President Hart concurred in the recommendation of the Corp Honor Committee which was approved by the Commandant of Cadets to dismiss Bateman from the Corp. This was done on April 22, 1975 and a special Order was published on April 23, 1975 dismissing Bateman from the Corp. This was before Bateman appealed the decision or met with Hart on April 24, 1975. The Court contended that Appellant should have made his arguments relative to the self-incrimination violation to President Hart. However, this contention fails to recognize a crucial fact, namely, that Hart had, before Bateman had visited with him, already approved Bateman's dismissal. It is submitted that any claim by Bateman that his rights have been violated would have been futile and fallen on deaf ears since President Hart had already issued an Order dismissing Bateman from the Corp prior to any consideration of the merits of Bateman's case. Furthermore, it is significant to note that the Court in this context and in the context of the jurisdiction of the Honor Board relies upon highly technical and procedural arguments to defeat Appellant's claim. It is submitted that the arguments and bases on appeal which the Court imposed upon Appellant, a college sophomore, are better raised by a person trained in the intricacies of the Law. However, Norwich University has a specific prohibition against counsel at any stage of these proceedings. Indeed, pursuant to Section 25-2(f)(3) Appellant was afforded the right to request the assistance of a Cadet or member of the staff of faculty who does not possess legal qualifications. This appears to be a specific effort on the part of Norwich University to deny cadets such as Appellant the right to legal advice and assistance and yet the Court, despite the rejection by Norwich of the opportunity for such legal assistance, uses highly technical procedural gaps in Appellant's self defense

as arguments for denying him judicial relief. Had Bateman been afforded the opportunity for legal counsel during the pendency of the proceedings against him at Norwich, perhaps the Court's arguments would have validity; however, to deny an individual the right to legal assistance and then to reject his claims because of "legal technicalities", hardly seems proper especially when viewed in the context of the Appellee's specific efforts to deny the right to legal counsel and the nature and position of Appellant, a college sophomore.

ARGUMENT

III.

THE COURT ERRED IN CONCLUDING THAT APPELLANT'S RIGHTS OF CROSS-EXAMINATION WERE WAIVED.

The Regulations at Page 90 specifically afford an accused Cadet the opportunity to cross-exam all adverse witnesses. A security officer was one of the two members of the campus security force who observed Bateman during the alleged stealing incident. This officer did not testify at the hearing but his statement was read into the record after the chairman had asked Appellant if he objected to this procedure and Appellant replied that he did not. The Court in effect concluded as it did relative to the self-incrimination argument that Appellant had waived his rights by failing to appeal this error to the President. Appellant submits that the same arguments relative to the Court's error in the self-incrimination context are applicable here.

ARGUMENT

IV.

THE COURT ERRED IN DETERMINING THAT APPELLANT WAS NOT ENTITLED TO A HEARING TO DETERMINE WHETHER HE VIOLATED HIS AGREEMENT WITH APPELLEE HART.

As indicated, on April 23, 1975, Appellant was dismissed from the Corp of Cadets by President Hart. The following day, April 24, 1975, Appellant requested that he be permitted to finish the semester. This permission was granted by President Hart on condition that Bateman reside off campus and return to Norwich in civilian clothes to attend classes, consult with Professors or use the library. On May 9, 1975, the Commandant of Cadets reported that Bateman had violated this Agreement and recommended to President Hart that Bateman be immediately dismissed. Appellee Hart states in his Affidavit that "after reviewing the basis for the recommendation, I approved the dismissal and ordered the Commandant (Wadsworth) to inform Mr. Bateman." As Paragraph #21 of Appellant's Complaint in Affidavit form indicates, on or about May 9, 1975 Appellant was informed by defendant Wadsworth that he had violated the agreement and would be immediately dismissed. Plaintiff was not given any prior notice or hearing concerning this alleged violation of the Agreement entered into between himself and defendant Hart. Appellant submits that the Regulations of Appellee University required a hearing before the Commandant's Hearing Board preceded by adequate and complete notice of the offense since Appendix I of the Regulations defines "breaking restriction" as a Class I offense and further defines entering a room in the barracks without authority as a Class I offense. The Court dismissed this argument ruling that Bateman had been dismissed from the Corp on April 23, 1975 and that he was allowed back on campus to finish the semester but only in civilian status. The Regulations go to great lengths

to define the various statuses that a student at Norwich University can have. Cadets, Norwich women and "special matriculants" are subject to the Regulations (See Overleaf of Regulations). Further, special matriculants are defined in Section 35 of the Regulations (Page 85). It is clear that Appellant does not fit within the category of special matriculant and therefore it is submitted that he must be considered a Cadet. Further, it is extremely interesting to note that the Court utilized waiver and estoppel theories to deny plaintiff's claim but completely ignores the claim made by Appellant in the Court below that by entering into the Agreement with Appellant on April 24, 1975, the University waived its rights to insist on immediate dismissal from the Cadet Honor Committee. Appellant renews those arguments herein, namely, that President Hart, on April 24, 1975, effectively waived the decision for dismissal by the Corp Honor Committee and permitted plaintiff to continue his academic program. Appellee had the clear right to remove Appellant from the Norwich campus as of April 23, 1975. However, by permitting Bateman to remain on campus (and presumably permitting him to continue his tuition payments) Appellant contends that Appellees intentionally relinquished a known right, that is, to remove Bateman from the University and by doing so, subjected themselves to a determination that Bateman was still in fact a Cadet and if he in fact broke restrictions that were placed upon him by Appellee Hart that he should be subject to the hearing and notice provisions of the Regulations.

CONCLUSION

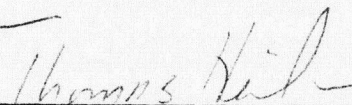
The opening Introduction to the Regulations that Norwich University in Paragraph 4 state:--

"Quibbling over technicalities is indicative of a failure to grasp the true spirit of these Regulations."

It is respectfully submitted that the lower Court used an extraordinarily broad but erroneous panoply of technicalities to dismiss and reject valid, legitimate claims brought by Appellant challenging his dismissal from his University shortly before the final exams of his second semester of his sophomore year. For the reasons stated herein it is respectfully requested that the Court reverse the Decision of the lower Court.

Dated this 14th day of February, 1977.

Respectfully submitted,



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February 15, 1977

A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
U.S. Courthouse
Foley Square
New York, NY 10007

Re: Our File #3531
Bateman vs. Norwich University

Dear Mr. Fusaro:

Enclosed herewith please find the original and 25 copies of the
above-entitled Brief for the Court's review. *are here.*

Two copies of same have this day been forwarded to Garfield Miller,
Attorney for Defendant.

Very truly yours,

Thomas Heilmann
THOMAS F. HEILMANN

TFH:sal

Encl.

cc: Garfield Miller, Esq.

Briefs are here.
Sent note for appendix & motion 2-17-77